

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

<b>KENNETH PHILLIPS,</b>	)	
	)	
<b>Petitioner/Defendant,</b>	)	
	)	<b>CIVIL NO. 07-cv-461-MJR</b>
<b>vs.</b>	)	
	)	<b>CRIMINAL NO. 05-cr-40057</b>
<b>UNITED STATES of AMERICA ,</b>	)	
	)	
<b>Respondent/Plaintiff.</b>	)	

**MEMORANDUM AND ORDER**

**REAGAN, District Judge:**

This matter is before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence. This motion was filed by Petitioner, *pro se*, and the Government has not filed written responses to this motion. For the reasons set forth below, the motion is denied.

Pursuant to a plea agreement and stipulation of fact, Petitioner entered a plea of guilty to one count of conspiracy to manufacture and distribute 50 or more grams of methamphetamine, in violation of 21 U.S.C. § 846. On August 28, 2006, he was sentenced to 84 months imprisonment, four years supervised release, a fine of \$500, and a special assessment of \$100. Petitioner did not appeal, but he later filed the instant motion.

Petitioner entered into a plea agreement with the Government in an attempt to benefit himself. In exchange for the benefits he received, Petitioner waived his right to a direct appeal and to a collateral attack under Section 2255. Specifically, the plea agreement provides in relevant part:

The Defendant is aware that Title 18, Title 28, and other provisions of the United States Code afford every defendant limited rights to contest a conviction and/or sentence. Acknowledging all this, and in exchange for the recommendations and concessions made by the Government in this plea agreement, the Defendant

knowingly and voluntarily waives his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law, except that if the sentence imposed is in excess of the Sentencing Guidelines as determined by the Court, the Defendant reserves the right to appeal the reasonableness of the sentence. The Defendant acknowledges that in the event such an appeal is taken, the Government reserves the right to fully and completely defend the sentence imposed, including any and all factual and legal findings supporting the sentence, even if the sentence imposed is more severe than that recommended by the Government. Defendant knowingly and voluntarily waives his right to seek a pardon, whether before or after his release from custody.

Plea agreement at ¶ III.2 (Doc. 147, criminal case).

The Seventh Circuit has held that “a waiver of a right to appeal contained within a guilty plea is enforceable,” provided the waiver is knowing and voluntary. *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7<sup>th</sup> Cir.), *cert. denied*, 520 U.S. 1281 (1997); *United States v. Schmidt*, 47 F.3d 188, 190 (7<sup>th</sup> Cir. 1995). *See also United States v. Wenger*, 58 F.3d 280, 281 (7<sup>th</sup> Cir.), *cert. denied*, 116 S.Ct. 349 (1995). A waiver will not be enforced, however, if the district judge relied on impermissible facts in sentencing (for example, the defendant’s race or gender) or if the judge sentenced the defendant in excess of the statutory maximum sentence for the offense committed. *Feichtinger*, 105 F.3d at 1190.

Similarly, the Seventh Circuit has found that a waiver of Section 2255 relief in a plea agreement is enforceable, and should be treated no differently than the waiver of a direct appeal. *Jones v. United States*, 167 F.3d 1142, 1145 (7<sup>th</sup> Cir. 1999). Indeed, the Seventh Circuit has specifically stated that both statutory and constitutional rights can be waived in a plea agreement. *Id.* at 1144; *United States v. Woolley*, 123 F.3d 627, 631-32 (7<sup>th</sup> Cir. 1997); *Feichtinger*, 105 F.3d at 1190.

For the waiver to apply, however, Petitioner’s sentence had to be within the maximum provided for in the statute of conviction and the applicable guideline range based upon Petitioner’s

relevant conduct. The maximum penalty for distribution of 50 or more grams of methamphetamine is life imprisonment. 21 U.S.C. § 841(b)(1)(A)(viii). Based upon the conduct to which Petitioner admitted and others attributed to him, his applicable range of imprisonment was 84 to 105 months; Petitioner was sentenced to 84 months. There is no basis in the record for avoiding this waiver, as the Court neither relied upon constitutionally impermissible factors in sentencing Petitioner nor sentenced him above the statutory maximum.

Therefore, because the waiver provisions of a plea agreement are enforceable, Petitioner has waived any right to bring this Section 2255. Accordingly, Petitioner's motion pursuant to 28 U.S.C. § 2255 is **DENIED**, and this action is **DISMISSED** with prejudice.

**IT IS SO ORDERED.**

**DATED this 8<sup>th</sup> day of July, 2008.**

s/ Michael J. Reagan  
**MICHAEL J. REAGAN**  
**United States District Judge**